Supreme Court, U.S.
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No. _____

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1993

THE STATE OF TEXAS,
Petitioner,

v.

GAYLAND BRADFORD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

DAN MORALES
Attorney General of Texas

JORGE VEGA
First Assistant Attorney General

DREW T. DURHAM
Deputy Attorney General

MARGARET PORTMAN GRIFFEY
Assistant Attorney General
Chief, Capital Litigation Division

*CHARLES A. PALMER
Assistant Attorney General

P. O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 463-2080

ATTORNEYS FOR PETITIONER

* Counsel of Record

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QUESTION PRESENTED

When a capital murder defendant is examined by a psychiatric expert and offers the expert's testimony on the punishment-phase issue of the defendant's capacity for future dangerousness, does the trial court violate the fifth and sixth amendments by ordering the defendant to submit to an examination by the state's psychiatric expert, who testifies in rebuttal regarding future dangerousness?

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PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Petitioner herein, by and through its attorney, the Attorney General of Texas, and files this Petition for Writ of Certiorari.[1]

OPINION BELOW

The opinion of the Texas Court of Criminal Appeals reversing Bradford's capital murder conviction and death sentence is not yet reported. *Bradford v. State*, ___ S.W.2d ___, No. 71,048 (Tex. Crim. App. June 9, 1993), attached

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[1] For clarity, Petitioner will be referred to as "the state" and Respondent as "Bradford."

hereto as Appendix A. Rehearing was denied without written order on January 26, 1994. *See* Appendix B.

JURISDICTION

This petition for writ of certiorari is filed within 90 days after the denial of rehearing on January 26, 1994. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The court below found that Bradford suffered a deprivation of rights secured by the fifth and sixth amendments to the United States Constitution.

STATEMENT OF THE CASE

On January 6, 1989, an indictment was filed in Cause No. F89-76496 in the 203rd District Court of Dallas County, Texas, alleging that on or about December 29, 1988, Bradford did

> knowingly and intentionally cause the death of BRIAN EDWARD WILLIAMS, an individual, hereinafter called deceased, by shooting said BRIAN EDWARD WILLIAMS with a firearm and the defendant intentionally did cause the death of the deceased while the said defendant was in the course of committing and attempting to commit the offense of Robbery of deceased . . . .

Tr. 5.[2] On January 2, 1990, Bradford filed a "Request for Examination of Defendant." That document in its entirety read as follows:

> COMES NOW, DEFENDANT GAYLAND BRADFORD, by and through his

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[2] "Tr." refers to the transcript of papers from Bradford's trial, and "R" refers to the record of transcribed trial testimony.

> attorney of record, EDWIN V. KING, JR., and asks that this Honorable Court order that he be transported by the Dallas County Sheriff's Department to Parkland Hospital for an electroencephalogram (EEG) and a CT Scan of the head (Head CT) with and without infusion of contrast media; and additionally that he have neuropsychological testing by way of Wechsler Adult Intelligence Test (WAIS) and Luria Nebraska or Halstead Reitan test to be administered by qualified personnel. Said request is made in light of the rulings of Pennery [sic] vs. Lynaugh and Ake vs. Oklahoma.

Tr. 56. On January 8, 1990, the trial court granted the motion. *Id.* at 58. Bradford pled "not guilty" and was tried by a jury in the 265th District Court of Dallas County. On January 30, 1990, the jury returned a verdict finding Bradford guilty of capital murder. Tr. 121, R IV 54.

Thereafter, a separate hearing was held on punishment. The state presented substantial evidence of Bradford's bad reputation in the community, prior criminal record and record of misbehavior while in prison, as well as evidence of several extraneous offenses, including burglary and plotting the death of a witness in his capital murder trial. R V 2--VII 180. After presenting testimony from two of Bradford's uncles and the grandmother of one of his two illegitimate children, the defense rested. R VIII 32.

The state then offered rebuttal evidence. Following the testimony of three lay witnesses, Dr. John Rennebohm testified for the state. Dr. Rennebohm, a psychiatrist, had not examined Bradford. R VIII 105, 220. He nonetheless gave a professional opinion, in response to a lengthy hypothetical question that summarized the state's evidence, *id.* at 105-26, that Bradford suffered from an antisocial personality disorder. *Id.* at 129. Dr. Rennebohm described the attributes of a sociopath such as

Bradford, *id.* at 130-41, and opined that such a person would constitute a continuing threat to society. *Id.* at 142-43.[3] On cross-examination, defense counsel elicited testimony regarding how a mental status examination normally is conducted, R VIII 161-168, and succeeded in having Dr. Rennebohm agree that a personal examination is "a tool in determining what's wrong or right with the person . . . ." *Id.* at 168.

Following the testimony of another lay witness, the state rested in rebuttal, and the defense offered a psychologist, Dr. Richard Fulbright, as a witness. R VIII 230. Dr Fulbright had

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[3] At the time of Bradford's trial, Article 37.071 of the Texas Code of Criminal Procedure provided as follows:

> (b) On conclusion of the presentation of the evidence, [at the sentencing phase of a capital murder trial] the court shall submit the following three issues to the jury:
>
> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
>
> (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.
>
> * * * * *
>
> (e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death.

examined Bradford, *id.* at 233, and diagnosed him as being of "borderline" intelligence--in the bottom ten percent of the population. *Id.* at 236. At the conclusion of Dr. Fulbright's testimony, R IX at 106, a hearing was held outside the jury's presence at which the prosecutor sought to establish that Bradford had refused to be examined by a psychiatrist chosen by the state. *Id.* at 107-09. The prosecutor reiterated his belief that the state was entitled to have Bradford examined and argued that the defense should not be allowed to introduce testimony from a psychiatrist who had examined Bradford unless Bradford agreed to be examined by two psychiatrists chosen by the state. *Id.* at 110-11.

The defense psychiatrist, Dr. Robert Wettstein, then was questioned outside the presence of the jury, R IX 113, and testified that he had examined Bradford on December 2, 1989. *Id.* at 117. Following his testimony, the prosecutor renewed his request to have Bradford examined by a psychiatrist for the state, and the court granted it. *Id.* at 142. Bradford, acting on the advice of counsel, told the court that he would refuse to speak with the state's psychiatrist, *id.* at 145, following which the court ruled that Wettstein could testify but could not refer to his examination of Bradford. *Id.* at 146, 147-48. Eventually, Bradford agreed to submit to an examination by the state's psychiatrist, Dr. James Grigson, so long as Dr. Wettstein could be present. *Id.* at 154-55, 157-58.

When trial resumed, Dr. Wettstein testified in the presence of the jury. R IX 163 *et seq.* His testimony included his opinion that predicting whether an individual will be a future danger is "very uncertain," *id.* at 173-74, that such predictions usually are wrong, *id.* at 176-77, and that predictions of future dangerousness based on hypothetical questions are substantially less accurate. *Id.* at 178-79. Dr. Wettstein then testified about his examination of Bradford. R IX 182 *et seq.* According to Dr. Wettstein, Bradford was of borderline intelligence with an IQ in the bottom ten percent of the population. *Id.* at 183, 185-86. He believed that Bradford was incapable of thoughtful behavior,

id. at 190, and that a videotape of the capital murder showed that Bradford's conduct was not planned. *Id.* at 193. He reiterated that future dangerousness is unpredictable, *id.* at 196, and that even "borderline" individuals such as Bradford can learn from their mistakes. *Id.* at 198.

In rebuttal, the state presented Dr. Grigson as its expert witness. He had examined Bradford and diagnosed him as a sociopath and predicted that he would be a future danger. R XI 28, 35.

After the jury answered affirmatively the special issues submitted at the punishment phase, the court assessed punishment of death by lethal injection. On direct appeal, the Court of Criminal Appeals reversed, holding that the trial court had violated Bradford's fifth amendment privilege against self-incrimination and his sixth amendment right to counsel. The court below concluded that

> the trial court's action in making the admissibility of portions of Dr. Wettstein's proffered testimony contingent upon appellant submitting to an examination by a State-selected expert was erroneous and such violated the Sixth Amendment to the United States Constitution. And under these circumstances the admission of Dr. Grigson's testimony based upon his examination of appellant violated appellant's Fifth Amendment right against self-incrimination.

App. A 11.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE A SUBSTANTIAL CONFLICT OF AUTHORITY AMONG THE COURTS OF APPEALS AND STATE COURTS OF LAST RESORT.

A. There is a conflict between the United States Court of Appeals for the Fifth Circuit and the court below.

The judgment of the Texas Court of Criminal Appeals is in conflict with several decisions of the United States Court of Appeals for the Fifth Circuit, which includes Texas. The Fifth Circuit long has recognized that a defendant who presents psychiatric testimony in support of an insanity defense may be examined by a psychiatrist who will testify for the state, and that such a procedure violates neither the fifth nor sixth amendments. *See, e.g., Granviel v. Lynaugh*, 881 F.2d 185, 190 (5th Cir. 1989), *cert. denied*, 495 U.S. 963 (1990); *Riles v. McCotter*, 799 F.2d 947, 953-54 (5th Cir. 1986); *United States v. Cohen*, 530 F.2d 43 (5th Cir.), *cert. denied*, 429 U.S. 855 (1976).[4] In addition, the Fifth Circuit has indicated in dicta that when a defendant offers psychiatric evidence on the future dangerousness question at the punishment phase of a capital trial, the state may conduct an examination and offer expert testimony in rebuttal. *Battie v. Estelle*, 655 F.2d 692, 698 (5th Cir. 1981).

The holding of the court below simply cannot be squared with Fifth Circuit precedent. The significance of this sharp conflict within the Circuit should be sufficient to warrant

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[4] The Fifth Circuit also has held that lay testimony by the defense regarding mental status may be sufficient to warrant admission of expert psychiatric testimony by the state. *Schneider v. Lynaugh*, 835 F.2d 570, 576-77 (5th Cir. 1988).

exercise of the Court's certiorari jurisdiction. Otherwise, courts of overlapping jurisdiction will continue to apply diametrically opposed interpretations of federal constitutional law.

B. There is a conflict between numerous federal courts of appeals and state courts of last resort and the court below.

In addition, there are other considerations that militate in favor of review. As discussed below, the decision of the Court of Criminal Appeals also is in conflict with many decisions of the federal courts of appeals and state courts of last resort. This great weight of contrary authority, which finds ample support in numerous decisions of this Court, shows that the court below grossly misapplied controlling fifth and sixth amendment principles and wrongly decided the federal constitutional issues presented.

Numerous other courts have allowed examinations and testimony by state-chosen psychiatrists when the defendant placed his mental status in issue and offered expert psychiatric testimony. *See, e.g., Presnell v. Zant*, 959 F.2d 1524, 1533 (11th Cir. 1992) (insanity); *Sturgis v. Goldsmith*, 796 F.2d 1103, 1108 (9th Cir. 1986) (insanity); *United States v. Buchbinder*, 796 F.2d 910, 915 (7th Cir. 1986) (intent); *United States v. Byers*, 740 F.2d 1104, 1115, 1121-22 (D.C. Cir. 1984) (en banc) (insanity); *United States v. Madrid*, 673 F.2d 1114, 1121 (10th Cir. 1982) (insanity); *United States v. Albright*, 388 F.2d 719, 723 (4th Cir. 1968) (insanity); *United States v. Pope*, 372 F.2d 710, 720 (8th Cir. 1967) (en banc) (insanity), *vacated on other grounds*, 392 U.S. 651 (1968), *cert. denied*, 401 U.S. 949 (1971); *State v. Schackart*, 858 P.2d 639, 645 (Ariz. 1993) (intent); *Hartless v. State*, 611 A.2d 581, 584-87 (Md. 1992) (intent); *State v. Manfredi*, 569 A.2d 506, 512-13 (Conn.) (insanity), *cert. denied*, 498 U.S. 818 (1990); *State v. Hutchinson*, 766 P.2d 447, 451-53 (Wash. 1989) (intent and diminished capacity); *State v. Huff*, 381 S.E.2d 635 (N.C. 1989) (insanity), *vacated on other grounds*, 497 U.S. 1021 (1990);

State v. Briand, 547 A.2d 235, 238-40 (N.H. 1988) (battered woman syndrome); *State v. Manning*, 598 N.E.2d 25, 28 (Ohio Ct. App. - 9th Dist. 1991) (battered woman syndrome), *cert. denied*, 112 S. Ct. 1961 (1992); *State v. Druke*, 693 P.2d 969, 972-73 (Ariz. Ct. App. 1984) (intent); *State v. Dixon*, 655 S.W.2d 547, 560 (Mo. App. 1983) (diminished capacity), *cert. denied*, 464 U.S. 1072 (1984); *People v. Gilbert*, 300 N.W.2d 604, 608 (Mich. Ct. App. 1981) (diminished capacity); *People v. Atwood*, 420 N.Y.S.2d 1002, 1005-06 (1979) (extreme emotional disturbance). In each of these cases, the court found no violation of the fifth or sixth amendments.

Although not directly on point, the decisions likewise are consistent in the context of capital sentencing. In *State v. Cooey*, 544 N.E.2d 895 (Ohio 1989), *cert. denied*, 111 S. Ct. 1431 (1991), a capital defendant was examined by a psychiatrist with regard to his mental status defense. Following the examination, the defendant abandoned the defense. At the punishment phase, a presentence investigative report that contained statements from the psychiatrist was introduced. The Ohio Supreme Court affirmed, holding that the report was admissible to rebut the defendant's having raised mental disorder as a mitigating factor. *Id.* at 911.

Similarly, in *Ruiz v. State*, 772 S.W.2d 297 (Ark. 1989), at the punishment phase of a capital trial, the defendant offered testimony from a psychiatrist who had reviewed his records from a mental institution. Because the psychiatrist testified that the defendant would not be a future danger, the state was allowed to present rebuttal testimony from a psychiatrist who had examined those records and others. *Id.* at 307.

Finally, in *State v. Thompson*, 768 S.W.2d 239 (Tenn. 1989), *cert. denied*, 497 U.S. 1031 (1990), the defendant offered expert testimony at the punishment phase of his capital trial that he had displayed remorse about the murder and did not have an anti-social personality. In rebuttal, the state offered testimony from its psychiatric expert that the defendant was not remorseful

and had exhibited anti-social behavior. The Tennessee Supreme Court affirmed the conviction and sentence, holding that the state was entitled to rebut the defendant's expert testimony. *Id.* at 248.

The undersigned has discovered only two decisions that are in harmony with the judgment of the court below. In *State v. Vosler*, 345 N.W.2d 806 (Neb. 1984), the Nebraska Supreme Court found a fifth amendment violation when a state's psychiatrist examined and testified against a defendant who had offered psychiatric testimony that he was incapable of forming the requisite criminal intent. *Id.* at 812-13. In *Hickson v. State*, 589 So.2d 1366 (Fla. App. - 1st Dist. 1991), an intermediate appellate court held that the state was not entitled to a psychiatric examination of a defendant who intended to offer psychiatric testimony in support of a battered-spouse-syndrome defense. *Id.* at 1369.

It could not be more clear that the conflict of authority on the issues raised by this case is both substantial and irreconcilable. Granting review will resolve this conflict and further the uniform application of important constitutional principles. In addition, as discussed below, granting review will serve to correct an egregiously incorrect application of those principles.

II. CERTIORARI SHOULD BE GRANTED TO CORRECT THE COURT BELOW'S MISAPPLICATION OF FIFTH AND SIXTH AMENDMENT JURISPRUDENCE.

This case presents a narrow question that this Court has not decided: When a criminal defendant places his mental status in issue and offers expert testimony from an examining psychiatrist, is the state entitled to have a psychiatrist of its own choosing examine the defendant and testify in rebuttal? As demonstrated above, the great weight of authority, buttressed by

settled principles of law and equity, answers this question affirmatively. In addition, this Court's decisions are contrary to the judgment of the court below.

A. The fifth amendment was not violated.

A venerable tenet of fifth amendment jurisprudence is that a defendant who testifies in his own behalf may be cross-examined just as any other witness. *Fitzpatrick v. United States*, 178 U.S. 304, 315 (1900). To hold otherwise "would make of the Fifth Amendment not only a humane safeguard against judicially coerced self-disclosure but a positive invitation to mutilate the truth a party offers to tell . . . ." *Brown v. United States*, 356 U.S. 148, 156 (1958).

This rationale also applies when the defendant, by offering expert testimony, in effect testifies himself. Thus, in *Estelle v. Smith*, 451 U.S. 454, 465 (1981), the Court observed that "[w]hen a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he has interjected into the case." Thereafter, in *Buchanan v. Kentucky*, 483 U.S. 402, 422-23 (1987), the Court noted that if a defendant requests a psychiatric examination and presents psychiatric evidence, "then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested." Finally, in *Powell v. Texas*, 492 U.S. 680, 685 (1989), the Court reiterated that "it may be unfair to the State to permit a defendant to use psychiatric testimony without allowing the State a means to rebut that testimony . . . ."

These decisions all strongly suggest that in such situations the state may have the defendant examined by its own psychiatric expert, who then may testify in rebuttal. In holding to the contrary, the court below relied on language in *Simmons v. United States*, 390 U.S. 377, 394 (1968), that a defendant

should not be forced to surrender one constitutional right "in order to assert another."

> The Simmons rationale appears analogous in the instant cause. The trial court's requirement, at the State's urging, that appellant submit to the Grigson examination forced him, in effect, to choose between exercising his Fifth Amendment right against self-incrimination and his Sixth Amendment right to effective assistance of counsel. Like the United States Supreme Court, we find such coercion to be intolerable.

App. A 9-10. The approach of the Court of Criminal Appeals ignores the admonition that "the Constitution does not forbid 'every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights.'" *Jenkins v. Anderson*, 447 U.S. 231, 236 (1980), *quoting Chaffin v. Stynchcombe*, 412 U.S. 17, 30 (1973). It also ignores the equities in this case, which militate in favor of the state.

Perhaps the most frequently cited authority on this point of law is *United States v. Byers, supra*. Then-Judge Scalia, writing for a plurality that included then-Judge Ginsburg, noted that the other circuits to address the question "have uniformly held" that there was no fifth amendment violation. 740 F.2d at 1111. The *Byers* court also explained the equitable basis for its holding.

> It would be a strange situation, indeed, if, first, the government is to be compelled to afford the defense ample psychiatric service and evidence at government expense and, second, if the government is to have the burden of proof, . . . and yet it is to be denied the opportunity to have its own corresponding and verifying examination,

> a step which perhaps is the most trustworthy means of attempting to meet that burden.

740 F.2d at 1113, *quoting United States v. Pope*, 372 F.2d at 720.

The opinion of the court below misread this Court's precedents as holding that examination by a state-chosen psychiatrist is permissible only where the defendant requests a competency examination or raises an insanity defense. App. A 7-8. As the numerous conflicting decisions make plain, however, the state is to be afforded such an opportunity whenever the defensive theory is based on the defendant's "mental status," a term that encompasses far more than competency to stand trial and insanity at the time of the offense. This point was well made by the New Hampshire Supreme Court in *State v. Briand, supra*, which upheld an examination and rebuttal testimony after the defendant had offered psychiatric testimony in support of a battered-woman-syndrome defense.

> Many courts faced with similar situations have recognized that they have the inherent authority to order a defendant to submit to such an examination. These courts look to their inherent authority . . . not only where the defendant pleads insanity, but also where the defendant raises defenses recognized in other jurisdictions as distinct from insanity and typically requiring psychiatric evidence.
>
> Regardless of the proposed defense, courts have grounded their inherent authority upon their responsibilities both to promote the ascertainment of truth and to insure the orderliness of judicial proceedings . . . . Where the accused supports claimed defenses at trial by introducing expert psychiatric testimony based upon personal interviews, the finder of fact can intelligently

> evaluate that testimony only if the State has an opportunity to produce evidence of a similar quality in rebuttal.

547 A.2d at 237 (citations omitted).

For instance, in *Commonwealth v. Wayne W.*, 606 N.E.2d 1323 (Mass. 1993), the defendants offered psychiatric testimony, based on examinations, at their juvenile transfer hearing. When the trial court ordered them to submit to an examination by a psychiatrist for the commonwealth, they refused, and their expert's testimony was stricken as a sanction. The Massachusetts Supreme Court affirmed, finding that the defendants' interposition of their mental status as in issue in the case justified the trial court's orders. *Id.* at 1331.

Similarly, in *United States v. Phelps*, 955 F.2d 1258 (9th Cir.), *cert. denied*, 112 S. Ct. 2977 (1992), the defendant had been acquitted on an insanity defense and committed to an institution. When he sought release on the ground that he no longer was a danger, the trial court ordered him to undergo an examination to address his suitability for release. The Ninth Circuit, relying on *Byers*, affirmed. *Id.* at 1263.

B. The sixth amendment was not violated.

In addition to finding no fifth amendment violation, the *Byers* court also concluded that the sixth amendment was not offended.

> Byers was confronted by the procedural system at the point at which he had to decide whether to raise the insanity defense, a determination that would have several legal consequences, including the likelihood of a court order that he undergo psychiatric examination, *see* Fed.R.Crim.P. 12.2(c). At that stage, assistance of counsel was provided. He was likewise confronted by the procedural system at the point at which he had to

> decide whether to introduce psychiatric testimony on his own behalf--which would have the effect of permitting the Government to introduce psychiatric testimony to the contrary. There also, assistance of counsel was provided. But at the psychiatric interview itself, he was not confronted by the procedural system; he had no decisions in the nature of legal strategy or tactics to make--not even, as we have seen, the decision whether to refuse, on Fifth Amendment grounds, to answer the psychiatrist's questions. The only conceivable role for counsel at the examination would have been to observe.

740 F.2d at 1118.

Here, the same holds true. The record reflects that Bradford had the opportunity to consult with counsel prior to the examination and that he initially stated that he would follow counsel's advice and refuse to submit to the examination. SR IX 145. It was only after the trial court announced that it would limit the defense's psychiatric testimony if Bradford did not agree to the examination that he relented. *Id.* at 154-55, 157-58. In addition, Bradford's own psychiatric expert was allowed to be present during the examination. On this record, there can be no doubt that the state did "provide counsel with notice before examining the defendant concerning future dangerousness." *Powell v. Texas*, 492 U.S. at 685.

The Court of Criminal Appeals did not explain why it found that Bradford's sixth amendment right to counsel had been violated.[5] Apparently here, as in *Powell*, the court "conflated the Fifth and Sixth Amendment analyses . . . ." 492 U.S. at 683. Regardless what was the basis of the court below's holding, however, it is incorrect. Bradford's fifth and sixth amendment

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[5] The dissenting opinion in the court below found that Bradford had not alleged a sixth amendment violation. App. 24 n.3.

rights were not infringed by the trial court's order that a psychiatrist chosen by the state be allowed to examine him and testify in rebuttal.

CONCLUSION

For the foregoing reasons, the Petitioner prays that the writ of certiorari to the Texas Court of Criminal Appeals issue.

Respectfully submitted,

DAN MORALES
Attorney General of Texas

JORGE VEGA
First Assistant Attorney General

DREW T. DURHAM
Deputy Attorney General
For Criminal Justice

MARGARET PORTMAN
GRIFFEY
Assistant Attorney General
Chief, Capital Litigation Division

CHARLES A. PALMER*
Assistant Attorney General

P. O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 463-2080
Fax No. (512) 463-2084

ATTORNEYS FOR
PETITIONER

* Counsel of record

APPENDIX A

GAYLAND BRADFORD, Appellant

No. 71,048 v. - - - - Appeal from DALLAS County

THE STATE OF TEXAS

OPINION

In January of 1990, appellant was convicted, in the 265th Judicial District Court of Dallas County, of capital murder pursuant to V.T.C.A. Penal Code §19.03(a)(2), specifically murder during the course of committing and attempting to commit robbery. The indictment alleged that the offense occurred on or about the 29th day of December 1988. After the jury returned affirmative answers to the special issues submitted pursuant to Article 37.071(b)(1)(2), V.A.C.C.P., the trial court assessed punishment at death. On direct appeal, appellant raises one hundred four points of error.

I.

SUMMARY OF PERTINENT FACTS

The record reflects that the instant offense involved the late-night armed robbery of a grocery/convenience store. During the robbery, a store security guard was shot to death. Appellant, in a written confession, admitted shooting the guard. A store videotape recorded the shooting and confirmed appellant's confession.

II.

EXPERT TESTIMONY AT PUNISHMENT

Points eleven, twelve, thirteen and fourteen all involve the trial court's refusal to allow certain expert psychiatric testimony proffered by a defense witness at punishment unless appellant agreed to be examined by an expert psychiatric witness of the State's choosing. It is undisputed that none of the psychiatric/psychological examinations in the instant cause were for the purpose of determining competency or sanity issues. During appellant's presentation of evidence at punishment, the State expressed concerns about not having the opportunity to have an expert psychiatrist of its choosing examine appellant. The State asked that appellant's psychiatric expert not be allowed to testify because the State had been denied access to examine appellant. The State requested that Dr. Rennebohm and/or Dr. Grigson be allowed to examine appellant.

Appellant's witness, Dr. Wettstein, was questioned outside the presence of the jury.[1] After questioning about his anticipated testimony, the State asked that Dr. Grigson, Dr. Rennebohm, a Dr. Turner, or a Dr. Coones be allowed to examine appellant; and that if appellant refused to submit to such, that Dr. Wettstein's testimony be disallowed. Appellant's

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[1] The proffered testimony of Dr. Wettstein focused on three areas:

1. Future dangerousness in the long term cannot be accurately predicted;

2. Appellant was diagnosed as borderline intellectual functioning;

3. Appellant was not diagnosed as having an antisocial personality disorder.

attorneys strenuously objected to being forced to make such a choice.

Appellant's attorneys, in expressing an understanding that the trial court was going to order appellant to undergo psychiatric examination by some other psychiatrist, indicated that appellant was not knowingly and voluntarily waiving his Fifth Amendment right regarding incrimination.

The trial court ordered appellant to submit to an examination by the State's psychiatrist. Appellant's attorneys advised appellant to refuse to participate and exercise his Fifth Amendment right to remain silent. Appellant himself indicated that he was going to follow his attorneys' advice and not talk to the doctor. Appellant said, "I do not want to talk to him[,]" and responded negatively when again asked. The State then asked "that the testimony of Dr. Wettstein be disallowed, he not be allowed to testify[.]"

The trial court ruled that it would restrict the testimony of Dr. Wettstein and only allow testimony by Dr. Wettstein that did not include, as a basis for his opinion, the examination of appellant. The trial court stated, "[a]nything that he used in the examination of [appellant] in making his conclusions or opinions w[ould] not be allowed. . . . The results of an examination by a [d]efense psychiatrist and the statements given by the [d]efendant to that psychiatrist will not be admitted." The trial court indicated that this would preclude Dr. Wettstein from giving an opinion about appellant's diagnosis and his intellect or whether he was a sociopath as such opinion would clearly come from the examination. Later, as clarification, the trial court reiterated, "I'm just telling you, anything that Dr. Wettstein would testify to that would be based upon his personal examination of the [d]efendant would not be allowed." During discussions about the law involved in this matter of a defendant refusing to be examined, the trial court commented that "[n]one of the cases list what the sanction should be."

During the course of this discussion, appellant's attorneys again objected and insisted that imposing such a sanction denied appellant effective assistance of counsel and due process. There was then some discussion about the State not having previously filed a written motion for psychiatric examination; thus, further objection was made that the State's request was untimely and not in compliance with Articles 46.02(3)(d) and 46.03(3)(d), V.A.C.C.P. When the trial court mentioned getting Dr. Wettstein on to make a bill of exception, one of appellant's attorneys noted that he had seen Dr. Grigson outside, and that since the trial court's "ruling obviously cuts very deep[ly] into the defense . . . by disallowing pertinent evidence to be submitted to the jury," appellant would submit to the examination by Dr. Grigson with the proviso that Dr. Wettstein be allowed to be present and observe Grigson's examination. Though the State expressed displeasure at the prospect of Wettstein being allowed to be present during Grigson's examination, the prosecutor relented and agreed. Appellant himself, after consultation with his attorneys, also agreed to submit to an examination by Dr. Grigson with Dr. Wettstein present.

Appellant's attorneys stated that it was only because of the trial court's prior ruling that they were agreeing to submit to the Grigson examination. They explicitly did not waive any previous objections.

Thus, appellant agreed to submit to an examination by Dr. Grigson with Dr. Wettstein present and observing. In light of such, the trial court allowed appellant to present testimony by Dr. Wettstein which included opinions based upon his independent examination of appellant. After Wettstein's testimony, appellant, in anticipation of Dr. Grigson's examination, again objected to such "being done at the instance of the [trial court] - [that] the testimony of Dr. Wettstein was conditional, that the only way Dr. Wettstein could testify as to his diagnosis of [appellant] would be to allow the State the opportunity to examine [him]." Appellant made it clear that he

submitted to the examination because he felt bound by the trial court's ruling to which he objected. Appellant made it clear that he did not waive any Fifth Amendment rights.

In rebuttal, the State presented testimony from Dr. Grigson, who had conducted an examination of appellant. After Grigson's direct examination testimony and outside the presence of the jury and prior to cross examination, appellant stated for the record that prior to the testimony of Dr. Grigson, he had addressed the trial court and renewed his objection that had been made numerous times, which the trial court was well aware of, and that the trial court had allowed the objection to be made at that time to be considered timely as if made prior to the time Grigson testified. The trial court responded, "Any objection made at this time is timely and your rendering of what happened is correct."

III.

APPELLANT'S CLAIM

Point number eleven claims error and abuse of discretion in requiring that appellant be examined by Dr. Grigson to enable Dr. Wettstein's testimony to be admitted into evidence, because such was a violation of Estelle v. Smith and the Fifth and Sixth Amendments of the United States Constitution. Point twelve likewise claims error in imposing sanctions on appellant, i.e. by not allowing Dr. Wettstein's testimony about his examination, when such sanctions are not set out in the Rules of Criminal Procedure, Rules of Evidence, or applicable caselaw, because such denied him effective assistance of counsel and due process of law guaranteed by the Fourteenth Amendment to the United States Constitution and the Texas Constitution. Point number thirteen alleges error in requiring the Grigson examination in violation of the Fifth and Sixth Amendments of the United States Constitution. Point of error fourteen avers error and abuse of discretion in ordering that Dr. Grigson be allowed to examine appellant, over objection, solely to determine future

dangerousness. Obviously all of these points of error concern the trial court's decision with respect to making the admissibility of portions of Dr. Wettstein's proffered testimony contingent upon appellant submitting to an examination by a State-selected expert.

The State disputes whether the trial court ever "appointed" Dr. Grigson to do anything, in that it had already named him on its witness list, and that appellant dispensed with the need for an appointment order when he acquiesced to the examination. However, the trial court explicitly stated that it was going to order an examination at the earliest convenience. We find that the trial court did effectively order that appellant submit to an examination by one of the State's proposed experts. The fact that appellant submitted to such does not make it any less of an order from the trial court. Clearly Dr. Grigson conducted his examination of appellant, and appellant submitted thereto, pursuant to an order from the trial court.

The State also claims that "[b]y introducing evidence of two psychiatric evaluations, then, [a]ppellant clearly waived his Fifth Amendment rights in the instant case." It cites language in several United States Supreme Court cases in support of that proposition, specifically Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981); Buchanan v. Kentucky, 483 U.S. 402, 107 S.Ct. 2906, 97 L.Ed.2d 336 (1987); and Powell v. Texas, 492 U.S. 680, 109 S.Ct. 3146, 106 L.Ed.2d 551 (1989).

Estelle v. Smith involved a defendant's Fifth and Sixth Amendment rights under the United States Constitution being abridged by the State's introduction of psychiatric testimony at punishment because of the failure to administer warnings to that defendant prior to the examination which elicited incriminating statements and the failure to notify defense counsel that the examination would encompass the future dangerousness issue. Estelle v. Smith, supra. In light of the facts in the instant cause not involving any lack of such warnings or notice, Smith is not entirely analogous. However, the State cites language in Smith

which states that a criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding. Estelle v. Smith, 451 U.S. at 468, 101 S.Ct. at 1876, 68 L.Ed.2d at 372. The State suggests that such language implies that a capital defendant might waive his Fifth Amendment privilege by introducing psychiatric evidence. However, we observe that Smith then indicated that if, after being properly warned, such a defendant refused to answer an examiner's questions, a validly ordered competency examination could proceed but on the condition that the results be applied solely for that purpose; in other words, "the State must make its case on future dangerousness in some other way." Id.

The State also points to language in Buchanan v. Kentucky, 483 U.S. at 422, 107 S.Ct. at 2917, 97 L.Ed.2d at 355, which after discussing language from Smith regarding a defendant asserting an insanity defense and introducing supporting psychiatric testimony, states the logical proposition that if a defendant requests such an evaluation or presents psychiatric evidence, then at the very least, the State may rebut this presentation with evidence from the reports of the examination that the defendant himself requested; i.e. the defendant would have no Fifth Amendment privilege against the introduction of that psychiatric testimony by the prosecution. Again however, it is undisputed that none of the examinations in the instant cause were for the purpose of determining competency or sanity issues.

The State also cites Powell, apparently based upon its language suggesting that "it m[ight] be unfair to the State to permit a defendant to use psychiatric testimony without allowing the State a means to rebut that testimony[.]" Powell v. Texas, 492 U.S. at 685, 109 S.Ct. at 3149, 106 L.Ed.2d at 556. However, the Supreme Court was clearly speaking in the context of a defendant raising a "mental-status defense." Id. As noted previously, it is undisputed that the examinations in the

instant cause were not for the purpose of determining competency or sanity issues; thus, there was no "mental-status" defense raised and the Grigson examination was not ordered as rebuttal to such a defense. Specifically, we observe that such issues were not raised at trial, in that appellant did not present any such evidence at guilt/innocence. Neither of appellant's two punishment expert witnesses, a psychologist and a psychiatrist, raised such issues. We do observe that the transcript contains a "Request For Examination of Defendant" and an "order" granting such. However there is nothing indicating that when or if such examination was conducted it raised any competency or sanity issues. Appellant asserts, and the State does not contradict, that neither competency to stand trial nor sanity at the time of the offense had been raised per Articles 46.02 and 46.03, V.A.C.C.P. Our review of the statement of fact volumes transcribing pretrial hearings also does not reveal that any competency or sanity issues were raised.[2]

IV.

MERITS OF CLAIM

The Fifth Amendment to the United States Constitution provides, among other things, that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself[.]" U.S.Const., amend. V. It is very well-settled that this protection applies to defendants facing examinations seeking to elicit evidence to prove future dangerousness under Texas capital sentencing procedures. Estelle v. Smith, supra. Thus if appellant's statements made during the Grigson examination were compelled, then the above-quoted Fifth Amendment

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[2] We do note that evidence was presented regarding appellant's I.Q. and level of intelligence. However, such certainly was not raising legal insanity or competency to stand trial issues.

protection would have been violated in admitting into evidence Dr. Grigson's testimony based upon such statements.

Appellant vociferously objected to being ordered to submit to the Grigson examination. He specifically stated that he was acquiescing merely because the trial court was making the admissibility of evidence which he wanted to present be contingent upon submitting to such examination. Appellant insisted, and the trial court acknowledged, that such acquiescence was not waiving his claim of error in being coerced into a position of making such a choice.

We note that the United States Supreme Court, admittedly in a different context, has recognized that "an undeniable tension is created" when a defendant must choose between the pursuit of one benefit under the Constitution and the consequent waiver of another. Simmons v. U.S., 390 U.S. 377, 394, 88 S.Ct. 967, 976, 19 L.Ed.2d 1247, 1259 (1968). In Simmons, that defendant (actually named Garrett) had testified at his unsuccessful suppression hearing, whereupon the State thereafter presented that testimony at the trial on the merits. Id. at 389, 973, 1256. Under those circumstances, the Court said, "[W]e find it intolerable that one constitutional right should have to be surrendered in order to assert another." Id. at 394, 976, 1259. The Fifth Amendment privilege "is a bar against compelling 'communications' or 'testimony'. . . ." Schmerber v. California, 384 U.S 757, 764, 86 S.Ct. 1826, 1832, 16 L.Ed.2d 908, 916 (1966). That privilege is fulfilled only when the person is guaranteed the right to remain silent unless he chooses to speak in the unfettered exercise of his own will. Malloy v. Hogan, 378 U.S. 1, 8, 84 S.Ct. 1489, 1493, 12 L.Ed.2d 653, 659 (1964); Miranda v. Arizona, 384 U.S. 436, 460, 86 S.Ct. 1602, 1620, 16 L.Ed.2d 694, 715 (1966). Thus, a defendant has the right to remain silent and not discuss his case with anyone.

The Simmons rationale appears analogous in the instant cause. The trial court's requirement, at the State's urging, that appellant submit to the Grigson examination forced him, in

effect, to choose between exercising his Fifth Amendment right against self-incrimination and his Sixth Amendment right to effective assistance of counsel. Like the United States Supreme Court, we find such coercion to be intolerable.

This Court has specifically held that a trial court does not have the authority to appoint a psychiatrist for the purpose of examining a defendant for evidence relating solely to his future dangerousness, and that doing so was error. Bennett v. State, 742 S.W.2d 664, 671 (Tex.Cr.App. 1987), vacated and remanded on other grounds, 486 U.S. 1051, 108 S.Ct. 2815, 100 L.Ed.2d 917 (1988), reaffirmed, 766 S.W.2d 227 (Tex.Cr.App. 1989), cert. denied, 492 U.S. 911, 109 S.Ct. 3229, 106 L.Ed.2d 578 (1989). In McKay v. State, 707 S.W.2d 23, 38 (Tex.Cr.App. 1985), cert. denied, 479 U.S. 871, 107 S.Ct. 239, 93 L.Ed.2d 164 (1986), this Court affirmed a prosecutor's jury argument at punishment in which he stated that he could not have that defendant examined by a named expert witness just for the purpose of answering that question (apparently referring to one of the special issues), because the law did not allow him to do so. This Court stated that because there was no issue raised to that defendant's competency to stand trial or his sanity at the time of the offense, there was no vehicle by which the State could have had the court appoint a psychiatrist to examine him; i.e the law did not permit the State to have a psychiatrist appointed for the purpose of examining him for evidence relating solely to his future dangerousness, thus the prosecutor's jury argument was not misstating the law. Id. This Court even added that had that defendant been so examined, he could have prevented the State from using the evidence obtained therefrom by claiming his Fifth Amendment right against self-incrimination per Estelle v. Smith. Id.

We also observe certain language by this Court in Hernandez v. State, 805 S.W.2d 409 (Tex.Cr.App. 1990), cert. denied, ___ U.S. ___, 111 S.Ct. 2275, 114 L.Ed.2d 726 (1991), which involved that defendant claiming that his Fifth Amendment privilege against self-incrimination had been

violated by allowing the State to present at punishment expert testimony based upon a competency examination. This Court approved of the procedures, specifically noting that that expert "was explicitly prohibited from expressing any opinion concerning [that defendant's] future dangerousness based on his examination of [that defendant], and he did not so opine." (Footnote omitted.) Id. at 412. This Court also noted that that expert's testimony, "while relevant to the issue of future dangerousness, was not a direct assertion of an expert opinion concerning future dangerousness." (Emphasis in original.) Id. at 413. The record reflects that in the instant cause Dr. Grigson's testimony based upon his examination of appellant did indeed include very direct assertions of his expert opinion concerning appellant's future dangerousness.

In light of the above authority, we conclude that the trial court's action in making the admissibility of portions of Dr. Wettstein's proffered testimony contingent upon appellant submitting to an examination by a State-selected expert was erroneous and such violated the Sixth Amendment to the United States Constitution. And under these circumstances the admission of Dr. Grigson's testimony based upon his examination of appellant violated appellant's Fifth Amendment right against self-incrimination. Finding such error we must conduct a harm analysis. Satterwhite v. Texas, 486 U.S. 249, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988); Bennett v. State, 742 S.W.2d at 671; Tex.R.App.Pro. 81(b)(2).

V.

HARM ANALYSIS

Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) provides the initial basis for analyzing error and determining whether such was harmless. We have said that our own Tex.R.App.Pro. 81(b)(2) is the Texas codification of Chapman. Cook v. State, 821 S.W.2d 600, 605 (Tex.Cr.App. 1991), cert. denied, ___ U.S. ___, 112 S.Ct. 1705, 118 L.Ed.2d

413 (1992). Rule 81(b)(2) mandates that we reverse the judgment under review unless we determine beyond a reasonable doubt that the error made no contribution to the conviction or to the punishment. As the error in the instant cause only arose at punishment, we shall limit our attention to its contribution at that stage, i.e. in the jury's answering of the special issues. It is well-settled that in answering the special issues the jury may consider all of the evidence adduced at the guilt stage. Miniel v. State, 831 S.W.2d 310, 322 (Tex.Cr.App. 1992), cert. denied, ___ U.S. ___, 113 S.Ct. 245, 121 L.Ed.2d 178 (1992); Fuller v. State, 827 S.W.2d 919, 934 (Tex.Cr.App. 1992). Therefore we shall likewise consider the evidence adduced at guilt/innocence in analyzing the harm at punishment.

In Harris v. State, 790 S.W.2d 568 (Tex.Cr.App. 1989), this Court articulated a coherent standard for determining when an error is harmless. We do not determine harmlessness simply by examining whether there exists overwhelming evidence to support the verdict, but rather calculate as much as is possible the probable impact of the error on the jury in light of the existence of the other evidence. Id. at 587. "A procedure for reaching this determination should: first, isolate the error and all its effects, using the considerations set out above and any other considerations suggested by the facts of an individual case; and second, ask whether a rational trier of fact might have reached a different result if the error and its effects had not resulted." Id. at 588. In performing the isolating analysis, we examine the source and nature of the error, whether or to what extent it was emphasized by the State, its probable collateral implications, and consider how much weight a juror would probably place upon the error and determine whether declaring it harmless would encourage the State to repeat it with impunity. Id. at 587.

A. Dr. Grigson's Testimony

Dr. Grigson indicated that his examination lasted 90 minutes. He testified that he questioned appellant about the particulars of the instant offense and appellant's reactions to the

judicial proceedings, including jury selection. He stated that approximately one hour and fifteen or twenty minutes of the examination "was entirely devoted to the crime itself in terms of [appellant's] behavior before the crime, . . . during the crime, and . . . after the crime[,] with maybe five . . . [or] ten minutes . . . going into [appellant's] prior record." Dr. Grigson testified in detail about what appellant had related regarding the reasons for the killing, including that appellant had shot the decedent again while on the floor. He also testified to appellant's explanation of having bought the murder weapon off the street for $25.00. Dr. Grigson testified that he inquired as to the disposition of the murder weapon, but that appellant specifically refused to reveal its whereabouts. Dr. Grigson insisted that such indicated that "obviously, th[at] gun was evidence in something else[,]" i.e. another criminal offense. He indicated that the fact that appellant would not reveal the whereabouts of the gun was extremely important. Dr. Grigson also testified about what appellant had told him about prior criminal arrests and convictions, and problems adjusting in prison. He also indicated that he had confronted appellant with the belief that this was not the first time that appellant had killed, though appellant disputed that.

Dr. Grigson opined that appellant was a "continuous liar." He also related that appellant expressed "absolutely no shame, no embarrassment, no guilt, no remorse" about the instant offense; he "absolutely guarantee[d]" that appellant had none. Dr. Grigson also indicated that he was impressed with appellant's vocabulary and responses to questioning. He stated that such indicated "clearly, absolutely, that [appellant] is of average intelligence from an intellectual standpoint[,]" and that poor school performance was "due to lack of motivation." He also indicated that he "kn[e]w" that appellant had a much higher I.Q. than tests had revealed. Dr. Grigson also testified that appellant had "the weirdest haircut" that he had seen, apparently with "lightning bolts on the side of the head."

When specifically asked about the future dangerousness special issue, Dr. Grigson testified that he had gleaned an opinion based upon the examination, reviewing some evidence and being made aware of appellant's past history records, and comparing appellant with other individuals that he had examined. Based upon those factors, Dr. Grigson opined that appellant would commit future criminal acts of violence. He further opined that appellant "very definitely presents a very serious threat to any society that he's in." He added that in his opinion appellant was "one of the most dangerous killers that [he'd] examined or ha[d] come in contact with." At the end of the State's direct examination, Dr. Grigson reiterated that he "ha[d] absolutely no doubt whatsoever . . . [and] [he] c[ould] guarantee . . . [that appellant] w[ould] commit continuing acts in the future, distant and far." Dr. Grigson clearly stated that his opinions were at least partially based upon the various things that appellant had told him during the examination.

B. Other Evidence

The State also presented expert psychiatric testimony from Dr. Rennebohm. He testified that he had never examined appellant, but rather expressed opinions in response to a rather lengthy hypothetical question. His opinion was that the person described in the hypothetical had a sociopathic personality disorder. He added that such a person would be counted as "high level sociopathy, severe antisocial attitude." He indicated that the prospects for change in such person was almost nonexistent. He also explicitly opined that the subject of the hypothetical "would constitute significant hazard or a threat to others in a confinement situation." He did not expect the person in the hypothetical to diminish in danger.

As noted initially, the instant offense involved the armed robbery of a grocery/convenience store in which a store security guard was shot to death. We have reviewed the evidence at guilt/innocence, including appellant's confession and the videotape which confirmed the confession.

At punishment the State also presented testimony from a former jail inmate to whom appellant had offered money to have one of the witnesses killed, and indicated that he had committed multiple robberies and had acquired such money. That former inmate testified that killing the witness had initially been discussed when he was in jail with appellant, but that appellant then called him again making such offer after he had gotten out. He also testified that appellant had laughed about having taken some necklaces from other inmates.

The State also presented evidence of appellant's prior convictions for burglary of a building and robbery. There was also evidence of various disciplinary violations which he had had in prison. Several witnesses testified as to appellant's bad reputation. There was also testimony about him committing several offenses, including various traffic violations, pulling a knife on a person interceding during a theft, breaking into a school and stealing food, and twice turning up inside a neighbor's house, apparently uninvited, in the middle of the night. Various people from the juvenile and adult probation system, and from the prison and parole systems, testified about appellant.

C. Application of Harris Factors

As discussed above pursuant to Harris, supra, we must first isolate the error and all its effects. The nature of the error in the instant cause was erroneously requiring appellant to submit to the Grigson examination in order to present his testimony based upon the Wettstein examination. This resulted in Dr. Grigson's testimony based upon his examination. The source of the error was the State managing to convince the trial court to make the admissibility of appellant's evidence from the Wettstein examination contingent upon his submitting to the Grigson examination. As the evidence was very much focused upon the punishment special issues, we do not perceive any probable collateral implications.

Dr. Grigson was the very last witness to testify. Both the State and appellant immediately thereafter rested and closed. The State's opening argument at punishment did not mention Dr. Grigson's testimony. The State's closing argument only briefly discussed his testimony. The prosecutor stated that Dr. Grigson is "a very strongly opinionated man" and suggested that if the jury wanted to disagree with him, then it could throw his opinions out. However, the prosecutor reminded them that even in disregarding Dr. Grigson's opinions, it could not disregard the facts.

As noted above, the State did not place heavy emphasis upon Dr. Grigson's testimony during the punishment jury argument. Nevertheless, as the prosecutor himself observed, Dr. Grigson expressed some extremely strong opinions regarding appellant. Dr. Grigson's experience and expertise was also made very clear to the jury when he testified. As noted previously, he was the last witness to testify, and there was a very powerful content to his message. In light of such, including the strength and adamancy of the testimony, it is probable that the jury likely placed great weight on Dr. Grigson's testimony.

A finding that this error is harmless might encourage the State to repeat it with anticipated impunity, or at least not discourage the repetition of such. Though we think it likely that prosecutors will henceforth be aware of the danger of coercing a defendant to submit to an examination in the capital murder punishment setting, declaring such error harmless might be misinterpreted as tacit approval of such by this Court. Such an interpretation might very well lead to repetition of the error.

After so isolating the error and its effects, we must ask whether a rational trier of fact might have reached a different result if the error and its effects had not occurred. Harris, supra. We point out that we are not measuring the sufficiency of the evidence to sustain the jury's answers to the special issues, but rather are, pursuant to Rule 81(b)(2), determining whether we can conclude, beyond a reasonable doubt, that the error did not

contribute to the jury's answers at punishment. This point was emphasized by the United States Supreme Court in Satterwhite v. Texas, 486 U.S. at 258, 108 S.Ct. at 1798, 100 L.Ed.2d at 295 in stating that the question is "whether the State has proved 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained[,]'" rather than whether the legally admitted evidence was sufficient to support the death sentence. We observe that this Court had incorrectly found similar error in admitting testimony of Dr. Grigson to be harmless beyond a reasonable doubt because the properly admitted evidence was such that the minds of an average jury would have found the State's case sufficient on the future dangerousness special issue even if Dr. Grigson's testimony had not been admitted. See Satterwhite v. State, 726 S.W.2d. 81, 93 (Tex.Cr.App. 1986). However, the United States Supreme Court found otherwise and reversed this Court's decision. Satterwhite v. Texas, 486 U.S. at 260, 108 S.Ct. at 1799, 100 L.Ed.2d at 296. It specifically held that it found it "impossible to say beyond a reasonable doubt that Dr. Grigson's expert testimony on the issue of Satterwhite's future dangerousness did not influence the sentencing jury." Id.[3]

CONCLUSION

After reviewing the record in the instant cause and applying the above-described Harris analysis, and being guided as we must by the United States Supreme Court, we likewise find it impossible to conclude, beyond a reasonable doubt, that Dr. Grigson's expert testimony on the issue of appellant's future dangerousness did not contribute to the jury's answering of the

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[3] We note that while Satterwhite involved a violation of the 6th Amendment's right to assistance of counsel, rather than the Fifth Amendment's self-incrimination protections, such error resulted in Dr. Grigson's testimony being improperly admitted into evidence as in the instant cause. Thus the United States Supreme Court's discussion and treatment of harm is analogous.

future dangerousness special issue at punishment. Cook v. State, 821 S.W.2d at 605; Wilkins v. State, 847 S.W.2d 547, 554 (Tex.Cr.App. 1992). A rational trier of fact might have reached a different result if the error and its effects had not occurred.

Accordingly, because no separate punishment hearing is authorized for error occurring at the punishment stage of a capital murder trial, appellant's conviction is reversed and the cause remanded to the trial court. Satterwhite v. State, 759 S.W.2d 436 (Tex.Cr.App. 1988).[4]

OVERSTREET, JUDGE

(Delivered June 9, 1993)
EN BANC
PUBLISH

Clinton, J., not fully satisfied that the competing constitutional right has been correctly identified, joins only the judgment of the Court.

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[4] We note that Article 44.29(c), V.A.C.C.P. now provides for a new punishment hearing alone when a capital murder conviction is reversed due to error affecting punishment only. However, that Act provided that this change only applies to offenses committed on or after September 1, 1991. As previously noted, the instant offense was committed on December 29, 1988.

GAYLAND BRADFORD,
Appellant

v.

THE STATE OF TEXAS,
Appellee

Appeal from the 265th District Court of Dallas County

No. 71,048

DISSENTING OPINION

Today, a majority of this Court concludes that appellant should be granted relief based upon grounds that I believe to be bereft of merit. Therefore, I cannot agree with the rationale of the majority.

During the punishment phase of the trial, the State introduced the testimony of Dr. John Rennebohm. Rennebohm never examined appellant, but testified in reference to a hypothetical situation that encompassed the facts of this case. From that hypothetical situation, Rennebohm concluded that the person described was a sociopath who had almost no realistic chances for improvement. After Rennebohm concluded his testimony, appellant called Dr. Robert Wettstein as a witness. The State requested and received a hearing outside of the presence of the jury. At that hearing, the trial judge decided that Wettstein could testify about the inaccurate nature of predictions of future dangerousness, but could not testify about anything he had learned about appellant from examining appellant. After numerous objections and arguments,[1] the State and appellant agreed to let Wettstein testify about what he had learned from examining appellant in exchange for appellant submitting to an examination by Dr. James Grigson, with Wettstein in attendance.

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[1] The State argued against permitting Wettstein to testify about anything he had learned from examining appellant because the State had not been allowed to examine appellant. Appellant objected and prolonged discussions followed.

Appellant made it known that he agreed to this compromise only because the trial court was going to limit Wettstein's testimony otherwise.

At trial, Wettstein testified during the punishment phase. During cross-examination, the prosecutor elicited responses from Wettstein concerning what appellant had said to Wettstein during Wettstein's evaluation of appellant. Wettstein answered questions regarding what appellant had said about the commission of the crime. Appellant lodged no objections to Wettstein's testimony or to the State's questions regarding what appellant had said to Wettstein concerning the commission of the offense. The State also placed into evidence, without objection from the appellant, the notes Wettstein had taken during his evaluation of appellant. These notes also contained statements that appellant had made to Wettstein about the commission of the offense. The State offered Grigson's testimony in rebuttal to that of Wettstein.

At the outset, the majority relies upon Bennett v. State, 742 S.W.2d 664 (Tex.Cr.App. 1987). While this Court did state that the "trial court does not . . . have the authority to appoint a psychiatrist for the purpose of examining a defendant for evidence relating solely to his future dangerousness," 742 S.W.2d at 671, I do not find the Bennett case dispositive.

In Bennett, the appellant had already been examined concerning his sanity. The State requested that another exam be conducted by Grigson because the first psychiatrist was unavailable to testify. That is not the situation facing the Court in this case. Here, appellant was trying to put on evidence in support of the proposition that he did not constitute a threat of future dangerousness. The State offered Grigson's testimony in rebuttal to that of Wettstein. Therefore, other than for the proposition above quoted, the holding in Bennett is useless.

The majority, relying upon Estelle v. Smith, 451 U.S. 454 (1981), then concludes that the trial court erred in allowing

Wettstein to testify on the condition that appellant be required to submit to an evaluation by a psychiatrist chosen by the State (Dr. Grigson). The facts underlying Smith, however, differ materially from those involved in this case.

In Smith, as in Bennett, the defendant had introduced no psychiatric evidence and had given no indication that he intended to do so. Id. at 466. Also, the defendant submitted to an examination by the State's psychiatrist, Dr. Grigson, without being warned of his Fifth Amendment rights. Id. at 467. In Smith "the State offered information obtained from the court-ordered competency examination as affirmative evidence to persuade the jury to return a sentence of death." Id. (Emphasis added). In this case, the State was allowed to examine appellant because appellant was going to introduce Wettstein's testimony that future dangerousness could not be accurately predicted. The trial court's actions in this regard are in no way violative of the Supreme Court opinion in Smith. There, the Supreme Court expressly wrote that

> [w]hen a defendant asserts the insanity defense[2] and introduces supporting psychiatric testimony, his silence may deprive the State of the only

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[2] The majority seems to see some kind of difference between whether a defendant advances a mental-status defense to the entire prosecution (i.e. insanity or incompetency) or adduces some kind of defensive evidence for a more limited purpose (i.e. to prove only that the defendant does not constitute a future danger). In my view, this is an arbitrary distinction. As I understand the role of psychiatric testing, there is not some specialized exam for sanity or competency as opposed to another specialized exam for future dangerousness. There is certainly no evidence in the record to indicate that different types of tests are administered for determining sanity or competency as opposed to determining likelihood of future dangerousness. See Diagnostic and Statistical Manual of Mental Disorders

> effective means it has of controverting his proof on an issue that he interjected into the case. Accordingly, several Courts of Appeals have held that, under such circumstances, a defendant can be required to submit to a sanity examination conducted by the prosecution's psychiatrist. See, e.g. United States v. Cohen, 530 F.2d 43, 47-48 (CA5), cert denied, 429 U.S. 855, 97 S.Ct. 149, 50 L.Ed.2d 130 (1976); Karstetter v. Cardwell, 526 F.2d 1144, 1145 (CA9 (1975); United States v. Bohle, 445 F.2d 54, 66-67 (CA7 1971); United States v. Weiser, 428 F.2d 932, 936 (CA2 1969), cert. denied, 402 U.S. 949, 91 S.Ct. 1606, 29 L.Ed.2d 119 (1971); United States v. Albright, 388 F.2d 719, 724-725 (CA4 1968); Pope v. United States, 372 F.2d 710, 720-721 (CA8 1967) (en banc), vacated and remanded on other grounds, 392 U.S. 651, 88 S.Ct. 2145, 20 L.Ed.2d 1317 (1968).

Id. at 1874. (footnote omitted).

The decision in United States v. Cohen, supra, cited in Smith, was discussed by a panel of the Fifth Circuit Court of Appeals in Battie v. Estelle, 655 F.2d 692, 701 (5th Cir. 1981). The panel in Battie noted how the prosecution in Cohen had introduced the results of a court-ordered psychiatric examination

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(Third Ed.--Revised, 1987) pp. 15--16 wherein it is explained that

> [e]ach person is evaluated on each of these axes:
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> | | |
> |---|---|
> | Axis I | Clinical Syndromes and V Codes |
> | Axis II | Developmental Disorders and Personality Disorders |
> | Axis III | Physical Disorders and Conditions |
> | Axis IV | Severity of Psychosocial Stressors |
> | Axis V | Global Assessment of Functioning. |

only after the defense had introduced psychiatric testimony to raise a mental-status defense. Battie, 655 F.2d at 701. By introducing psychiatric testimony, the defendant had waived his Fifth Amendment privilege in the same manner as would the defendant who elected to testify at trial. Id. at 701-702. The rationale underlying this conclusion of waiver was that "[b]y introducing psychiatric testimony obtained by the defense from a psychiatric examination of the defendant, the defense constructively puts the defendant himself on the stand and therefore the defendant is subject to psychiatric examination by the State in the same manner." Id. at 702 n. 22. See also Pope v. United States, 372 F.2d 710 (8th Cir. 1967).

While the facts previously outlined strongly indicate, at the very least, an "implied" Fifth Amendment waiver, there is additionally a strong indication of an express waiver on the part of appellant. Appellant lodged no objections when the State elicited responses from Wettstein concerning what appellant said in regard to the circumstances of the offense. Wettstein's notes containing appellant's statements were admitted without objection by appellant. Therefore, the testimonial nature of appellant's statements to his own witness were before the jury in a way totally unconnected to the testimony of Grigson.

Moreover, the State elicited this testimony from Wettstein before Grigson even took the witness stand. Appellant's objection to being subjected to an examination by Grigson is unrelated in any way to appellant's failure to object to the testimonial aspects of his examination by Wettstein, about which Wettstein testified. Therefore, appellant waived any Fifth Amendment claim of privilege because his failure to object to his own witness' testimony about the offense constructively placed appellant himself on the witness stand. See Battie v. Estelle, 655 F.2d 692, 702 n. 22 (5th Cir. 1981).

In Buchanan v. Kentucky, 483 U.S. 402 (1987), the Supreme Court adopted more of a public policy stance, impliedly, at least, eschewing the waiver notion found in the

circuit opinions cited in Smith, ante. In Buchanan, the Supreme Court discussed Smith v. Estelle, supra, and specifically "recognized the . . . 'distinct circumstances' of [the Smith] case. . ."[3] 483 U.S. at 422. A majority of the Court specifically stated that in Smith they had "acknowledged that, in other situations, the State might have an interest in introducing psychiatric evidence to rebut [a] petitioner's defense . . ." Id. The Court specifically held that

> if a defendant requests such an evaluation [i.e. a sanity evaluation] or presents psychiatric evidence, then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested.

Id. at 422-423.

It is probably not a coincidence that, in Buchanan, the Supreme Court cited to United States v. Byers, 740 F.2d 1104

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[3] In Buchanan, the Supreme Court distinguished its prior holding in Smith. The Supreme Court explained that the State's conduct in Smith had violated the petitioner's Fifth Amendment rights because Grigson's prognosis of future dangerousness "was not based simply on his observations of the defendant, but on detailed descriptions of Smith's [the defendant] statements about the underlying crime." Buchanan, 483 U.S. at 421. (Emphasis in original). This fact rendered Smith's comments to Grigson "testimonial in nature" and made Grigson's conduct in testifying about those comments "essentially like that of an agent for the State recounting unwarned statements in a postarrest custodial setting." Id. at 422. Since Smith had not been warned of his Miranda rights prior to being examined, Grigson's testimony constituted a violation of Smith's Fifth Amendment rights. Id.

As an aside, we also note that in Smith, the Supreme Court found a Sixth Amendment violation. No such violation, however, is alleged in this case.

(D.C. Cir. 1984) in reaching its decision. In Byers, and to a lesser degree in Pope, supra, the issue was framed in terms of "the process of determining where the right to remain silent ends and the society's need to require testimony begins." Byers, 740 F.2d at 1114. As was so eloquently stated in Brown v. United States, 356 U.S. 148, 155-156 (1958), which was quoted in Byers,

> a defendant cannot reasonably claim that the Fifth Amendment gives him not only this choice [whether to testify or not] but, if he elects to testify, an immunity from cross-examination on the matters he has himself put in dispute. It would make of the Fifth Amendment not only a humane safeguard against judicially coerced self-disclosure but a positive invitation to mutilate the truth a party offers to tell. . . . The interests of the other party and regard for the function of the courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination.

Byers, 740 F 2d at 1114.

The question remaining is whether the Buchanan decision should be extended to a psychiatric evaluation performed for the purpose of rebutting a defendant's claim regarding future dangerousness. As I explained in footnote two, I see no distinction between compelling a defendant to submit to a mental-status examination as opposed to an examination pertaining to future dangerousness, and the arguments advanced in Byers, Buchanan, and Brown well support this notion. And I believe that this strikes at the heart of the majority's thesis -- that since no mental-status examination was involved, Buchanan does not apply. This premise misses the entire rationale explicated in Buchanan, Byers, and Brown. It is not the nature or name of the psychiatric test involved that is important. The only inquiry is

whether the Fifth Amendment privilege is applicable. Under the facts of this case, it is obvious 1) that appellant expressly waived his privilege and 2) that the public policy dictates of Buchanan apply to the proffer of evidence pertaining to future dangerousness.

Based upon my belief that the trial court's actions constituted no error, I would overrule appellant's points of error eleven through fourteen. The majority fails to so conclude, and, therefore, I dissent.

CAMPBELL, J.

DECIDED JUNE 9, 1993

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McCORMICK, P.J., AND WHITE AND MEYERS, JJ., JOIN.

APPENDIX B

GAYLAND BRADFORD, Appellant

No. 71,048 v. - - - - Appeal from DALLAS County

THE STATE OF TEXAS

SPA'S MOTION FOR

REHEARING IS DENIED.

1-26 1994.

Per Curiam

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JUDGE

STATE'S MOTION FOR

REHEARING IS DENIED.

1-26 1994.

Per Curiam

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JUDGE